IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 67 of 2003
with
CIVIL APPLICATION NO. 1387 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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MUKESHBHAI SUMATILAL SHAH

Versus

NARESHBHAI CHINUBHAI SODAGAR

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Appearance:

1. Appeal from Order No. 67 of 2003

MR JT TRIVEDI for Petitioner No. 1
MR BJ TRIVEDI for Petitioner No. 1
MS JIGNASA B TRIVEDI for Petitioner No. 1
MS VIRAL G PANCHAL for Petitioner No. 1
MR JAGDISH L PUJARA for Petitioner No. 1
MR MV CHOKSHY for Respondent No. 1
MR MB GANDHI for Respondent No. 1,2-3
MRS TRUSHA M GANDHI for Respondent No. 1-3

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CORAM : HON'BLE MR.JUSTICE C.K.BUCH

Date of decision: 07/02/2004

CAV JUDGEMENT

1. By this Appeal from Order under Sec.104 R/w O.43 R.1 of Civil Procedure Code ( CPC for short), the appellant-original plaintiff has challenged the order below application exh.7 for temporary injunction preferred in Summary Suit No. 4141/2002 passed by ld. Chamber Judge, City Civil Court, Ahmedabad on 7.2.2003.

2. The appellant is the original plaintiff of the suit for recovery of Rs.5,29,277-00 from respondent no.1 with running interest and costs. It is contended that respondent nos. 1 & 2 (original defendant nos. 1 & 2) have sought Title Clearance Certificate from an advocate in respect of the property being City Survey No.4277 Sheet No.26, Kalupur Ward No.2, located in Saudagar Pole, Relief Road, Ahmedabad. Defendant nos. 1 & 2 have sought the said certificate as they wanted to dispose of the said property, is one of the main contentions in the application exh.7. The appellant plaintiff had filed a Civil Suit being Civil Suit No.2601/2002 in City Civil Court at Ahmedabad for permanent injunction in reference to the very property, but as that suit was not recovery of the amount due, that suit was not pursued further and, therefore, the subsequent suit being Summary Suit No.4141/2002 for the recovery of the amount due is filed. While presenting the recovery suit for the aforesaid amount, the plaintiff took out notice for motion in terms of application exh.7 and ld. Chamber Judge, after hearing the parties on merits, vide impugned order dated 7.2.2003, rejected the said application which order is sought to be assailed in this Appeal from Order.

3. Mr. J.T.Trivedi, ld. counsel appearing for the appellant plaintiff has taken me through memo of appeal and grounds (A) to (E) raised in para-2 of the memo of the appeal and submitted that the order passed by the ld. Chamber Judge is under erroneous interpretation of law and is under misconception of the facts pleaded in the application as well as recovery suit.

4. The backbone of the arguments advanced by ld. counsel Mr. J.T. Trivedi for the appellant plaintiff is the document mark 4/26 dated 12.8.1994. The ld. Chamber Judge has appreciated this document in para-6 of the decision and has addressed the document as "so-called mortgage deed". Undisputedly, this document is neither registered nor is properly stamped. The reply filed by

defendant no.1 at exh.26 challenges the execution of the mortgage deed. The execution of the so-called mortgage deed has also been appreciated by the ld. Chamber Judge. It is on record that in response to the advertisement published in daily newspaper "Sandesh" dated 11.7.2002, the plaintiff has approached the concerned advocate Shri D.R. Patel and registered his objections for issuance of Title Clearance Certificate in respect of the said property. This resistance is at mark 4/13. It appears that Advocate Shri Patel had instructed the plaintiff to submit original mortgage deed for inspection, but it is on record that Mr. Patel was not supplied with the original mortgage deed. While appreciating the prima facie case of the appellant plaintiff, the ld. Judge has rightly held that no reliance should be placed on mark 4/26 dated 12.8.1994 and, therefore, the request to grant injunction restraining defendant no.1 from transferring his share in the suit property is refused. It is also very relevant to note that in a suit for recovery of money against one of the defendant interim prohibitory relief has been prayed which may have some effect on the right of the co-owner.

5. Considering the main relief prayed in the suit and the facts appreciated by the ld. Chamber Judge, the Court is of the view that there is no merits in the say of the appellant plaintiff. The jurisdiction of this Court is very limited while dealing with an appeal under O.43 R.1 of CPC and when there is no patent illegality or perversity in the order or in appreciation of the facts brought to the notice of the Court, this Court is not supposed to rewrite the judgment. Mr. Trivedi, ld. counsel appearing for the appellant has drawn my attention to section 25(3) of the Contract Act and it is argued that the defects found in the mortgage deed by the ld. Chamber Judge are curable and for collateral purpose the document in question can be looked into. Acknowledgment of the execution in uncertain terms is not required. Mr. Trivedi has drawn my attention to the following decisions:-

(i) M/s R.Sureshchandra & Co. v/s M/s Vadnere Chemical Works & Anrs.,AIR 1991 Bombay 44

(ii) Albert Judah Judah v/s Rampada Gupta & Anrs., AIR 1957 Calcutta 715;

(iii) Debi Prasad v/s Bhagwati Prasad & Anr., AIR 1943 All 43;

(iv) Kasturchand Jiwaji v/s Manekchand Devchand, AIR 1943 Bombay 447 ( P.450).

Ld. Counsel Mr. Trivedi has also taken me

through the relevant paras of the decision of the Apex Court in the case of Rai Chand Jain v/s Miss Chandra Kanta Khosla, reported in AIR 1991 SC 744. This decision is in reference to Sec.15(5) of East Punjab Urban Land Restrictions Act, 1949.

6. It seems that the plaintiff has prayed for interim relief so that he can bring pressure to other co-owners to pay the amount referred in the plaint. The plaintiff has prayed for interim relief qua the undivided interest of one of the co-owners and that too on the strength of the document which has been scrutinised in accordance with law by the ld. Chamber Judge. Mr. Trivedi, in response to the query raised by this Court, has produced the copy of an application for injunction submitted in an earlier suit being Civil Suit No.2601/2002 as well as written statement filed in the suit. Mr. Trivedi has pointed out the stand taken by the defendants in the earlier suit and has submitted that the appellant apprehends the transfer of the share of the defendants malafide to defeat the claim of the plaintiff. In the earlier suit, the defendants had contended that "in fact, there were certain dealings between the plaintiff and defendants, but the same have been cleared and paid and no amount under the said account is due and payable by the defendants to the plaintiff. ..... ..... That whatever promissory notes were executed, were paid of and cleared from time to time and, therefore, no such amount is outstanding, due and payable by the defendants to the plaintiff." It is argued by ld. counsel Mr. Trivedi that the gesture to disown the claim by the defendants has not been considered by the ld. Chamber Judge. But it is not on record that this document was brought to the notice of the ld.Chamber Judge. Even for the sake of arguments it is accepted that certified copy of the written statement filed by the defendants in the earlier suit is brought on record, it would not add any strength in prima facie case of the plaintiff nor balance of convenience would tilt in his favour. Undisputedly, all the owners of the property in question are not the executors of the document i.e. so-called mortgage deed. When the case of the plaintiff is that the Summary Suit filed against defendant no.1 is for recovery and that too on the basis of the promissory note etc., and the amount was advanced when he was in need, the question would be that what weightage can be given to the mortgage deed qua the properties referred to in the application. Though it is contended that since the defendant no.1 was unable to manage for the amount due, he had shown his willingness to mortgage his half share in the said property, but it seems that there must

be regular transactions between the plaintiff and defendant no.1. So, if a successful plaintiff is able to convince the Executing Court that defendant of the money suit has transferred the property malafide and that too with a view to defeat the claim of the plaintiff, then Executing Court can legally take care of that fact situation. There was no need to drag the other co-owners in the present litigation. On the contrary, interim relief if would have been granted as prayed for by the ld. Chamber Judge, the same would have prejudiced seriously to other co-owners.

7. I have also gone through the principles laid down by the different Courts in the above-referred decisions, but on facts as well as on the point of law involved in the cited decisions, the same are not found applicable on facts or on law i.e. Sec.25(3) of the Contract Act, to the case on hand. So, I do not see any need to discuss the same in detail. On the contrary, the observations made by the Apex Court in the case of Wander Ltd. and another v/s Antox India P.Ltd., 1990 (Supp.) SCC 727, helps the other said. The Apex Court has observed in the above-cited decision as under:-

> " The Appellate Court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the Court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the court below solely on the ground that if it has considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion."

In the present case, the Lower Court neither has ignored the settled principles of law regulating the grant or refusal of interlocutory injunctions nor the plaintiff is put to unwarranted disadvantageous position.

8. As there is no illegality or perversity found in

the order nor there is any material error in appreciating the say of the plaintiff, the present Appeal from Order requires to be dismissed. Hence, Appeal from Order is hereby dismissed. However, in the larger interest, I am inclined to observe that if defendant no.1 intends to sale or transfer his share in the property in question, he is directed to refer and mention about the pendency of the present claim - his debt in the deed of transfer so that a third party who may purchase the entire property or share of the defendant concerned, be saved from litigation and multiplicity of the proceedings also can be prevented. Appeal stands dismissed subject to above observations and directions. Interim relief granted earlier stands vacated. No costs.

9. In view of dismissal of the main Appeal from Order, Civil Application for stay i.e. Civil Application No. 1387/2003 also does not survive. Hence, civil application also stands disposed of accordingly. No costs.

[ C.K. BUCH, J ]
*rawal

FURTHER ORDER :

After pronouncement of the above judgment, ld. counsel Mr. J.T. Trivedi for the appellant has prayed to extend the interim relief granted earlier and continued till today for a reasonable period of time so as to enable the appellant to take appropriate decision whether to approach the higher forum or not.

In view of above, request is accepted. Interim relief granted earlier which has been vacated today by above judgment, is continued for a further period of Four Weeks from today.

[ C.K. BUCH, J ]
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